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IN THE

Supreme Court of the United States

October Term, 1967

No. 330

ROBERT B. ROBERTS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1967

No. ———

ROBERT B. ROBERTS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

This Court has previously granted a Writ of Certiorari in this case. *Levine v. United States* (1966), 383 U.S. 265, 86 S. Ct. 295, 15 L. Ed. 2d 737.

Petitioner, Robert B. Roberts, Appellant below, respectfully prays that a Writ of Certiorari issue vacating the judgment and conviction and remanding the case to the United States District Court for the Southern District of Florida for a new trial, under this Court's ruling in *O'Brien v. United States*, 87 S. Ct. 1158.

Petitioner, Robert B. Roberts, additionally prays that a Writ of Certiorari issue to review so much of a judgment of the United States Court of Appeals for the Fifth Circuit as affirmed the judgment of conviction

of the District Court for the Southern District of Florida, as to Counts Three, Six, Eight and Ten of the Indictment. The Court of Appeals had previously reversed in *Gradsky v. United States*, 342 F. 2d 147, as to Counts One, Two, Four, Five, Seven and Nine of the Indictment. The Judgment, thus affirmed in part, was entered upon a general verdict after trial by jury.

Orders and Opinion Below.

Subsequent to oral argument before the Court of Appeals following the granting of the Petition for Writ of Certiorari by this Court, the Department of Justice filed a Motion for Remand to the United States District Court for a new trial as to Appellant George Levine only because of this Court's ruling in *Black v. United States*, 385 U.S. 26. A copy of this Motion is printed in Appendix "A" to this Petition. On April 11, 1967, Petitioner filed a Motion to Remand to the United States District Court for a new trial. This Motion is printed in Appendix "B" to this Petition. On May 3, 1967, the Court of Appeals denied Petitioner's Motion without prejudice to such application by him to the District Court as may be appropriate. A copy of this Order is printed in Appendix "C" to this Petition. Petitioner then filed a Motion to Reconsider the Motion to Remand to the United States District Court for a New Trial in light of this Court's ruling in *O'Brien v. United States*, supra. A copy of this Motion is printed in Appendix "D" to this Petition. On May 25, 1967, the Court of Appeals denied Petitioner's Motion to Reconsider. A copy of this Order is printed in Appendix "E" to this Petition. The Opinion of the Court of Appeals is not yet reported but is printed in Appendix "F" to this Petition. A petition for

Rehearing was timely filed and thereafter the Court of Appeals entered its Order Denying Rehearing without Opinion. A copy of this Order is printed in Appendix "G" to this Petition.

Jurisdiction.

1. The judgment sought to be reviewed was entered May 2, 1967.

2. Petitioner filed timely a Petition for Rehearing which was denied on June 5, 1967.

3. The statutory provisions believed to confer jurisdiction on this Court to review the judgment in question are 28 U.S.C.A., Sec. 1254(1) and Rule 37(c) of the Federal Rules of Criminal Procedure.

4. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming in part has decided an important question of Federal law, arising under the criminal laws, which has not been, but should be considered and settled by this Court; has rendered a decision in conflict, on other questions involved, with the decisions of this Court and with other Courts of Appeal on a similar matter; has decided other important questions of Federal Criminal law in a way in conflict with applicable decisions of this Court, and has sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Questions Presented.

1. Did the Court of Appeals err in refusing to vacate the judgment and conviction and in not remanding the case to the United States District Court for the Southern

District of Florida for a new trial under this Court's ruling in *O'Brien v. United States, supra*?

2. Did the Court of Appeals err in stating legal principles not applicable to the facts shown in the record below and contrary to decisions of this Court?

3. Did the Court of Appeals err in refusing to review on remand by this Court the evidence, the applicable principles of law, the instructions to the jury and the lack of essential jury instructions to determine whether Petitioner was entitled to further relief regarding his conviction for the substantive offenses?

Statutes Involved.

The statutes involved are 15 U.S.C. 77 q(a), fraud in the sale of securities; 18 U.S.C. 1341, mail fraud; and conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. (The text of these statutes are set forth in Appendix "H" to this Petition).

Statement of the Case.

By Indictment filed June 14, 1961, Petitioner was accused jointly with ten other codefendants of multiple violations of 15 U.S.C. 77 q(a), fraud in the sale of securities (set forth in Counts One through Five inclusive of the Indictment); 18 U.S.C. 1341, mail fraud (set forth in Counts Six through Nine inclusive of the Indictment); and in Count Ten of the Indictment of conspiracy to violate the corporate security and mail fraud laws in violation of 18 U.S.C. 371. Each of the substantive offenses in Counts One through Nine was listed as an overt act in Count Ten.

After trial on the above charges, Petitioner was convicted upon all Counts as were all other defendants. His application for probation was denied, as was his motion for new trial, and he was sentenced for a period of one year on each Count with the sentences to run consecutively.

The charges against Petitioner arose out of the operation and subsequent bankruptcy of the Credit Finance Corporation (herein referred to throughout as "CFC"), a Florida corporation. CFC was incorporated on November 19, 1958, with the Articles of Incorporation being signed by Defendant Leonard Glaser, as President and Director owning 100 shares of stock, Geraldine Glaser, as Secretary and Director owning 50 shares of stock, and by Sylvia Wagner, as secretary and Director owning 50 shares of stock, with all of the stock being issued at a price of $50.00 per share [Govt. Ex. 2]. Later, all of the stock was acquired by Defendants Norman and B. J. Gradsky and, in turn, sold by them to the Security Guaranty Company on April 1, 1960. Security Guaranty Company subsequently sold the stock to Defendant George Levine on July 22, 1960 [R. 941, 954, 983, 1395, 1435, 3457, 3630-3631, 3635].

CFC was formed for the principal purposes of lending money to automobile purchasers and purchasing real estate for development of subdivision and commercial building [R. 4293-4294].

During the Gradsky's ownership of CFC, Norman Gradsky was President [R. 1414]. During Security Guaranty Company's ownership, Robert Greene was President and later George Levine became President [R. 1414, 1419]. At no time did Petitioner have any financial interest in CFC, as a shareholder or otherwise [R. 3881-3882].

CFC sold corporate notes to the public in denominations of $1,000.00 paying interest originally at the rate of 12% and later at 8% [R. 1388-1389, 1841]. The reduction in interest was necessitated by a change in Florida law limiting the interest rate to 8% [R. 1841]. The first such note was issued by CFC on April 3, 1959, and the last in October of 1960. In all, notes in the amount of approximately $528,400.00 were issued [R. 3480, 3872-3873].

The evidence indicated that during the Gradsky's ownership, CFC funds were used to assist in the purchase of their family residence and for the purchase of an airplane and Cadillac automobiles for them [R. 2613, 2733, 3507]. There was additional testimony that the total disbursement of CFC funds to the Gradsky family and "related corporations" amounted to $541,968.25 [R. 3511]. As of July 22, 1960, CFC was insolvent and later became bankrupt [R. 798, 3624].

In the sale of the corporate notes certain representations were made to the potential purchasers. These included statements that CFC was a Florida corporation dealing in land and subdivisions; that CFC owned land next to a subdivision and an office building in Melbourne, Florida; that CFC was checked regularly by the State of Florida; CFC was making money from its investments; that CFC paid 8% interest and dealt in automobile notes; that the accounts were insured, and that CFC helped finance the Baptist Church in Orlando [illegible] and in detail, was [illegible] CFC was [illegible]

audited by the Florida State Comptroller's office, did own buildings and deal in land and subdivisions and at times the corporate notes were secured by an assignment of accounts receivable equal to the amount of the notes thereby being insured [R. 1388-1389, 1444-1445, 2560, 3450-3451, 3454-3455, 3465; Govt. Exs. 57-H, and 31-T]. Petitioner's position throughout the trial was that his representations were made in good faith, honestly believing them to be true, and with no intent to defraud.

CFC maintained offices at both Melbourne and Orlando, Florida [R. 1015, 1881]. The Orlando office was under the supervision of Defendant Gertrude Hogue who was a Vice President of CFC [R. 1388, 1396, 1403]. Petitioner was employed by CFC from August 15, 1959, to April 20, 1960, but only on a part-time basis [R. 1727, 1730, 3873, 3874-3875]. Part of his duties consisted of acting as salesman in the Orlando office [R. 1390]. He received instruction as to these duties from Defendant Hogue who was in charge of the Orlando office [R. 1450, 1726]. As of the time Petitioner ceased his employment with CFC, the Orlando office had received no complaints from customers that the interest and principal had not been paid [R. 1755].

During his employment by CFC, Petitioner received compensation totaling $2,618.70 which averaged $243.00 per month for the nine-month period. In addition, he was reimbursed for his out-of-pocket expenses [R. 3876-3877, 3879]. A SEC investigator testified that he found nothing improper or irregular in any of these payments.

At no time was Petitioner a Director or shareholder of CFC, have any financial interest in the company, nor

was he authorized to sign checks on behalf of the company [R. 3880-3882]. He had no connection with the company books and records, made no entries therein and had no knowledge of the financial condition of CFC [R. 3880-3882, 3884, 3895, 1755-1756]. He signed no deeds on behalf of CFC for the acquisition of real property and no contracts for the purchase of any personal property [R. 3885, 4011-4012]. CFC made no payments for or on behalf of Petitioner. He borrowed no money from CFC and received nothing from CFC to which he was not entitled [R. 3887-3888].

There was no evidence that Petitioner mailed, signed, knew of any mailing or caused any mailing of letters of solicitation to the investors of CFC.

Of the several hundred Exhibits introduced during the trial, only ten pertained to Petitioner. Exhibit 4 was a certified copy of the Articles of Incorporation of Credit Realty Company in which Petitioner's name appears as one of the incorporators. The prosecution conceded that this signature was a forgery [R. 4236]. Exhibit 19 was Petitioner's appearance bond in the within action. Exhibits 74, 107 and 109 were CFC notes containing Petitioner's name as a Vice President of CFC. Exhibits 96 and 108 were receipts for a note containing Petitioner's name. Exhibits 144 and 146 were lease agreements for advertising in which Petitioner alone appears as signing for CFC. In Exhibit [illegible] Petitioner's name appears as witness to a lease. There was no evidence that Petitioner in fact signed any of these documents or that the signatures thereon were his. Of these ten Petitioner had [illegible] Exhibits were from CFC solicitation literature, only 7 mentioned Petitioner. Exhibit [illegible] CFC bock-

keeper, stated that in March and April 1960 Petitioner was in the Orlando office of CFC but that he wasn't doing anything [R. 943]. Mrs. Hightower, a secretary in the CFC Orlando office, testified that Petitioner was reprimanded by Mrs. Hogue for telling a prospective customer that the money was insured and that he was told by Mrs. Hogue that he would be discharged if he did it again [R. 1452, 1739, 1751]. She further testified that Petitioner terminated his employment with CFC in April 1960 [R. 1391]. Stanton Mooney, an investor, testified that Petitioner prepared, but didn't sign a note in the sum of $2,000.00 [Ex. 74, R. 1836-1837, 1901]. Mr. Ver Pault, another investor, testified that Petitioner picked up an expired note of his and signed a receipt for it and that Petitioner told him that a Florida regulation required the company to pay only 8 per cent instead of the 12 per cent previously paid [Ex. 96, R. 2132-2133, 2161]. Another investor, Mr. Kryway, testified that Petitioner helped him carry a television set to his car from the CFC office [R. 1932]. Mary Reilly, also an investor, stated she met Defendant Gibbons and Petitioner at the Orlando office in December 1959 and that in a conversation with them, she was told that the investor's money was insured [R. 2226, 2228]. She did not recall whether Gibbons or Petitioner made that statement [R. 2248]. George Callahan, a SEC investigator, testified as to Petitioner's salary and that he found nothing improper or irregular concerning these payments [R. 3876-3877, 3879]. He further stated that Petitioner was a part-time employee of CFC between August 1959 and April 1960 and after April 20, 1960, was no longer with CFC [R. 3873-3876].

[illegible] Count Three alleges a fraudulent sale to Mr. and Mrs. Kryway accomplished by a letter placed in the mails in Orlando, Florida, on March 17, 1960. Mr. Kryway stated that after seeing an advertisement in the paper, he went to the CFC office and spoke to Defendant Hogue who explained to him the limitations on non-resident investment, gifts for investors, and asserted CFC had assets of $5,000,000 and was engaged in the real estate and [illegible] business in Florida [R. 1917-1920]. Mr. Krywey received a note for $3,000 signed by Defendant Hogue in an envelope postmarked Orlando and dated March 17, 1960 [Govt. Ex. 88, R. 1922]. After his talk with Mrs. Hogue, he had intended to investigate the company further but didn't get around to it [R. 1919]. Petitioner helped Mr. Krywey carry a television set from the CFC office to his automobile but there was no evidence that Petitioner participated in or even was within earshot of the conversation between Mr. Krywey and Mrs. Hogue. Thus, there was [illegible] connecting Petitioner to this Count [illegible]

dated January 25, 1960 [Govt. Ex. 89; R. 1944, 1954]. He had no intention of investing in CFC after receipt of the letter [R. 1944]. In August of 1960 he went to the CFC office in Orlando and met Defendant Schiff who told him that CFC had financed the Baptist Church, had real estate, financed cars and was inspected by the State auditors [R. 1847, 1949-1950]. Mr. Stamper testified that the envelope in which he received the letter [Govt. Ex. 89] was mailed in Orlando because the letterhead had an Orlando address [R. 2081]. There was no evidence at all connecting Petitioner to this Count.

Count Eight alleges a fraudulent sale to Mrs. Virack accomplished by a letter placed in the mail in Orlando, Florida, on January 21, 1960. In January, 1960, Mrs. Virack went to the CFC Orlando office and spoke to Defendant Gibbons who told her that CFC dealt in real estate and automobiles and that her money was as safe as in a bank [R. 1068, 1070]. She then invested $5,000 [Govt. Exs. 53 and 44; R. 1072]. Later she received a letter through the mail signed by Gibbons, dated January 21, 1960, concerning a gift of a camera [Govt. Ex. 46; R. 1078]. She did not retain the envelope in which she received Exhibit 46 and there was no evidence that it was mailed in Orlando [R. 1085-1086, 1088]. There was no evidence connecting Petitioner in any way to this Count.

REASONS FOR GRANTING THE WRIT.

1. Did the Court of Appeals Err in Not Remanding This Case to the United States District Court for the Southern District of Florida for a New Trial Under the Rule Announced in O'Brien v. United States, *Supra*? Does the Decision of the Court of Appeals With Respect to Its Interpretation of Pinkerton v. United States, 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180, Conflict With the Decisions of This Court in Nye and Nissen, 93 L. Ed. 919, 336 U.S. 613, 69 S. Ct. 766, and Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435?

Petitioner respectfully suggests that the Court of Appeals should have remanded this case to the District Court for a new trial under the rule announced in *O'Brien v. United States, supra*. In the *O'Brien* case, the Solicitor General conceded that a wiretap had been laid to overhear certain conversations of O'Brien, but stated that the logs of the monitoring agents were not communicated in any manner outside the FBI. This same concession was made by the Solicitor General in the instant case concerning certain conversations of Defendant George Lemm. In the *O'Brien* case, no conversation [illegible] was involved in any way in the trial, but nevertheless was granted a new trial [illegible]. Petitioner believes [illegible] that same position in this case as [illegible] in the *O'Brien* case and therefore [illegible] a new trial.

Petitioner respectfully suggests that the United States Court of Appeals erred in its opinion in stating the fol-

lowing legal principles not applicable to the facts shown by the record below:

1. "A party to a conspiracy is liable as a principal for all offenses committed in furtherance of the conspiracy while he is a member of it. *Pinkerton v. United States*, 328 U.S. 640; 66 S. Ct. 1180, 90 L. Ed. 1489, but a latecomer cannot be convicted as a principal for substantive offenses which were committed in furtherance of the conspiracy before he joined it or after he withdrew from it. *Levine v. United States*, *supra*. In this case, with the exception of Schiff's conviction on Count 8, each appellant stands convicted of only those substantive offenses committed in furtherance of the conspiracy while he was a member of the conspiracy. There is thus no error." [Opin. p. 6]. An instruction on the *Pinkerton* theory was not given in the case at bar. [R.T. 4298]. The Government's Requested Instruction No. 47 on the *Pinkerton* theory was refused by the trial court. The result of the Court of Appeals' foregoing statement is that a defendant may be convicted of substantive offenses committed in furtherance of the conspiracy while he is a member of the conspiracy even though no *Pinkerton* instruction was given to the jury. This does not correctly reflect existing law.

Nye and Nissen v. United States, *supra*, and *Pinkerton* make it clear that membership in a conspiracy alone (unless the jury is properly instructed) does not make a conspirator vicariously liable for substantive offenses committed by other co-conspirators. A conspirator can be found guilty of a substantive offense even though he did not aid them [illegible] the conspiracy, provided the substantive offense was committed in furtherance [illegible] as a part of the conspiracy. With this limitation [illegible] that the jury be given precise instructions on the point.

If the jury was not so instructed, the *Pinkerton* doctrine is inapplicable. As stated in *Pereira v. United States, supra*, at page 445, "The Pinkerton case, however, is inapplicable here since the jury was not instructed in terms of that theory." Also, *Nye and Nissen, supra*, at page 925, holds that "A verdict on that theory (Pinkerton) requires submission of those fact issues to the jury."

This Court in *Nye and Nissen* and in *Pinkerton* itself recognizes that this doctrine is available only if (1) there is a connection between the conduct of the conspirator and the commission of the substantive offense and (2) the jury has been instructed that evidence establishing guilt of conspiracy cannot be used as a basis for conviction upon the substantive counts unless it has found the necessary connection to exist and further found that the acts referred to in the substantive counts were acts in furtherance of the conspiracy. *Nye and Nissen v. United States, supra*, at page 926. *Pinkerton* is needed to inform the jury of the condition under which they might use a finding of guilt of conspiracy as circumstantial evidence of guilt of the substantive counts. Lacking a *Pinkerton* instruction, the finding that a conspiracy existed cannot be used to fill out the circumstantial evidence for it cannot be assumed without a *Pinkerton* instruction that the acts constituting the conspiracy were found to be acts aiding and abetting the substantive counts or that the substantive counts were acts in furtherance of the conspiracy.

The judgment against Pettibone can be upheld only if the proof adduced and the basis on which it was submitted to the jury was sufficient to support the verdict. It is only when the jury has been properly instructed as

to the relevant standards to be applied to the evidence does a basis exist for determining whether evidence sufficient to support the verdict was present. Accordingly, the relevant question is not was the evidence sufficient, but rather was it sufficient to fulfill the required standards. *Nye and Nissen v. United States*, *supra*, at page 926.

It should be noted that the Pinkerton doctrine is questionable legal authority at this time. As stated in *Krulewitch v. United States*, 93 L. Ed. 7, 336 U.S. 440, 445, (Mr. Justice Jackson concurring opinion joined in by Justices Frankfurter and Murphy), "A recent tendency has appeared in this Court to expand this elastic offense and to facilitate its proof. In *Pinkerton*, it sustained a conviction of a substantive crime where there was no proof of participation in or knowledge of it upon the novel and dubious theory that conspiracy is equivalent in law to aiding and abetting."

2. "Appellants also urge that the District Court should have charged that to find an appellant guilty of a substantive offense in which he did not directly participate, the jury must determine that the substantive offense was committed in furtherance of the conspiracy of which he was a member. We doubt that this contention is properly before us on remand but we note that no appellant either requested this instruction be objected to the failure of the court to give it, although the court heeded most of the objections made to its charges. * * * In any event, the purpose of such an instruction is to preclude the possibility of convicting a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is a member in furtherance of a conspiracy of which the defendant is not

a member. The instruction thus was unnecessary here for there was evidence of only one conspiracy." [Opin. p. 7.]

The purpose of such an instruction is other than that stated by the Court of Appeals. The purpose is to inform the jury of the conditions under which they might use a finding of guilt of conspiracy as circumstantial evidence of guilt on the substantive act. It cannot be assumed, in the absence of such an instruction, that the acts referred to in the substantive counts were acts in furtherance of the conspiracy, nor can it be assumed that the acts constituting the conspiracy were found by the jury to be acts aiding and abetting the substantive counts. *Nye and Nissen*, *supra*, at page 928.

The Court of Appeals further suggests that because Petitioners did not request a *Pinkerton* instruction, nor object to the failure of the trial court to give it, will prevent Petitioner from presenting the error on appeal. Petitioner's liability for substantive offenses committed during the time he was allegedly connected with a conspiracy can be predicated upon three legal theories, and only three:

1. Direct participation in the commission of the substantive offense. In the case at bar, the trial court instructed the jury only on this theory [R. [illegible]; *Pinkerton v. United States*, *supra*, at page [illegible]. As stated in *Pereira v. United States*, [illegible] 347 U.S. 1, 14; 74 S. Ct. 358, [illegible] did not participate directly in [illegible] to accomplish the thirty-five [illegible] from El Paso to Los Angeles. [illegible] all, only as an aider and

2. Aiding and abetting another in committing an offense. 18 U.S.C. §2(a); *Pinkerton v. United States, supra,* at page 1497. No instruction on aiding and abetting was given in the case at bar. It is clear that a verdict on this theory requires submission of those fact issues to the jury. "The 'aiding and abetting' instruction entitled the jury to draw inferences supplying any lack of evidence directly connecting the petitioner Brading with the specific acts charged in the indictment from the abundant circumstantial evidence offered. The jury was properly charged on the theory." *Pereira v. United States, supra,* at page 445; *Nye and Nissen v. United States, supra,* at page 925 states "We see therefore no reason to exculpate him as an aider and abettor. There was no inadequacy in the charge to the jury on that theory."

3. Commission of a substantive offense by a co-conspirator as a part of and in furtherance of the conspiracy. *Pinkerton v. United States, supra.* An instruction on this theory was not given in the case at bar.

Petitioner is not concerned with, does not decide or have anything to do with the Government's theory of criminal responsibility. If the Government elects to proceed on the theory that Petitioner's guilt is predicated only as that of a direct participant in the commission of the substantive offenses, Petitioner's counsel would be derelict in his duty to suggest that a *Pinkerton* or aiding and abetting instruction also be given, thereby increasing Petitioner's exposure to a guilty verdict and an affirmance on appeal.

Petitioner's contention before this Court is that the proof adduced below and the basis on which it was submitted to the jury was insufficient to support the verdict.

The only postulate submitted to the jury on the question of Petitioner's guilt on the substantive offense was that of a direct participant [R. p. 4298]. Therefore, for that offense, guilt is individual and personal, not vicarious. To convict on the substantive counts, Petitioner actually must have used the mails as part of the execution of the scheme to defraud and in furtherance of the plan or he must have known, or reasonably have been expected to know, that the mails would be used. *Pereira v. United States, supra,* at page 447; *Parr v. United States,* 4 L. Ed. 2d 1277, 363 U.S. 370, 80 S. Ct. 1171.

As to Counts Three, Six and Eight, the record is barren of any evidence that Petitioner participated in a scheme to defraud which reasonably contemplated the use of the mails, and is equally barren of any evidence that Petitioner himself used the mails in furtherance of the plan. There is no evidence that Petitioner prepared or signed any document that was mailed or mailed any document or knew of any mailing or caused any mailing of any kind. *Pereira v. United States, supra,* at page 447; *Parr v. United States, supra,* at page 1290; *Williams v. United States,* 278 F. 2d 535, 537 (9th Circuit).

3. "We thus direct our attention to whether, in light of the Solicitor General's concession as to applicable legal principles, the members of the conspiracy 'are entitled

to further relief regarding the convictions for the substantive offense.'" [Opin. p. 5]

Petitioner contends that the Court of Appeals has too narrowly interpreted this Court's previous Writ of Certiorari in refusing to review the evidence, the applicable principles of law, the instructions to the jury and the lack of essential jury instructions to determine whether Petitioner is entitled to further relief regarding his conviction for the substantive offenses.

As heretofore stated, this Court has granted a prior Writ of Certiorari in this case "limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it." The petitions were denied in all other respects. *Levine v. United States*, 383 U.S. at page 266. In disposing of this case, this Court said:

> "In response to specific questions addressed by this Court, the Solicitor General has made a two-pronged concession: First, he concedes that an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; and second, he concedes that in this case some of the convictions for the substantive offenses must be reversed because they are inconsistent with this principle. On the basis of this concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals insofar as it affirms petitioners'

convictions for the substantive offenses. We remand the case to that court with instructions to reverse the convictions the Solicitor General concedes must be reversed, and to determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor General petitioners are entitled to further relief regarding the convictions for the substantive offenses."

The opinion of the Court of Appeals did not consider the evidence, the instructions to the jury, or the applicable principles of law in determining whether petitioner was entitled to further relief regarding the convictions for substantive offenses. Footnote No. 3 on Page 5 of the Opinion of the Court of Appeals sets forth the errors asserted by Petitioners on remand which that Court refused to review on remand, as follows:

"The following were submitted and considered on the appeal and are re-submitted again in this proceeding: The appellants' contention that the district court erred in refusing to instruct on the essential elements of conspiracy and of the substantive offenses; the lack of evidence to sustain a conviction on direct participation, yet the failure to instruct on aiding and abetting or the commission of a substantive offense by co-conspirator as a part of and in furtherance of the conspiracy; failure to instruct on specific intent and reasonable doubt; failure to give a cautionary, and the contention that the verdict was against the manifest weight of the evidence."

Conclusion.

Petitioner respectfully prays that a Writ of Certiorari issue vacating the judgment of conviction and remanding the case to the United States District Court for the Southern District of Florida for a new trial. Petitioner additionally prays that a Writ of Certiorari should issue to the end that so much of the Court's judgment that affirmed the judgment of the District Court on the substantive Counts may be further reviewed.

Respectfully submitted,

THOMAS F. CALL,
Attorney for Petitioner
Robert B. Roberts.

APPENDIX "A"

Motion for Remand.

In the United States Court of Appeals, for the Fifth Circuit.

George Levine, Appellant, v. United States of America, Appellee. No. 19974.

The appellant was convicted on July 19, 1962 in the Southern District of Florida on charges of conspiracy and violations of the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute. He was sentenced to fifteen months in prison on each of ten counts, a total of twelve and a half years. His conviction was affirmed by this Court on March 11, 1965 (342 F. 2d 147). After a petition for a writ of certiorari was filed in the Supreme Court of the United States by this appellant and three others, the Government conceded that there was no evidence to show that appellant Levine was involved in the conspiracy prior to July 1960, and that his conviction of seven substantive offenses prior to that time could not stand. The Supreme Court, on February 28, 1966, remanded the case to this Court with instructions to reverse the convictions the Government conceded must be reversed, and to determine, in the light of our conclusions, the evidence, instructions and applicable principles of law, whether further relief should be granted.

Subsequently, in accordance with the policy set forth in the Government's Supplemental Memorandum to the Supreme Court in *Schipani v. United States*, No. 304,

O. T. 1966), a review of the present prosecution was undertaken. It appears from this review that, pursuant to the Departmental authorization described at pages 2-3 of the Supplemental Memorandum for the United States in *Black v. United States*, 385 U.S. 26, No. 1029, O. T. 1965, the FBI installed a microphone by trespass in a commercial establishment which was owned by an acquaintance of appellant Levine and in which Levine may have had a proprietary interest. This surveillance covered the period May 11, 1962 to May 7, 1963. Logs made as a result of the surveillance are available.

Appellant Levine was under indictment in this case and the trial of said indictment took place during this period of surveillance. Conversations of petitioner Levine relating to the charges and with counsel in the case at bar were overheard. It appears that none of the material in the logs was communicated in any manner to the Securities and Exchange Commission, the Post Office Department, [illegible] and the prosecutors who tried the [illegible]

In view of the subject matter and content of the overheard conversations, and because the [illegible] [illegible] of the case in this proceeding by the

Supreme Court in *Black v. United States*, 385 U.S. 26. The Government, therefore, suggests that this Court enter an order vacating the judgment and remanding the cause to the District Court for a new trial.

Should the Government seek to prosecute the Appellant anew we will make available under an appropriate protective order copies of the logs in question to aid appellant in preparing for a new trial.*

Respectfully submitted,

Fred M. Vinson, Jr.
Assistant Attorney General
Criminal Division

March 31, 1967.

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*There are presently before the Court (petitions) Nassau Gradsky, Robert Grane and Robert B. Roberts. These electronic surveillance of these defendants and the of their conversations. These we believe entitled to any relief predicated upon rights. However, copies of the motion to these defendants, informing them of this action and to take such action as they deem in the appellate process.

APPENDIX "B."

Motion of Appellant Robert B. Roberts to Remand to the United States District Court for a New Trial or, in the Alternative, for Further Hearing in the United States District Court.

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, Howard W. Meadors, Gertrude Hogue, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. No. 19974.

The appellant Robert B. Roberts was convicted on July 19, 1962 in the Southern District of Florida on charges of conspiracy and violations of the anti-fraud provisions of the Securities Act of 1933 and the mail fraud statute. He was sentenced to one year in prison on each of ten counts to run consecutively, a total of ten years. His conviction was affirmed by this Court on March 11, 1965 (342 F. 2d 147) as to Counts Three, Six, Eight and Ten and the Judgment was vacated as to the remaining Counts. A Petition for Writ of Certiorari was filed in the Supreme Court of the United States by appellants Robert B. Roberts, George Levine, Robert Grene and Norman Gradsky. The Supreme Court on February 22, 1966 remanded the case to this Court with instructions to reverse the convictions [illegible] Government conceded must be reversed as to [illegible] and to reconsider in the light of the [illegible] concession, the evidence, instructions and [illegible] of the [illegible] further relief [illegible] and [illegible] this Court, on [illegible] on January 16, 1967, [illegible]

The Government has now filed a Motion for Remand to the District Court for a new trial as to appellant Levine in that the FBI improperly monitored conversations between Levine and his attorney, during the period of the trial of the within matter, relating to the charges against Levine. *Black v. United States*, 385 U.S. 26, 17 L. Ed. 2d 26.

Appellant Robert B. Roberts recognizes that this error as to appellant Levine does not necessarily require that his conviction be set aside. To secure a new trial he must show that the denial of Levine's constitutional rights prejudiced him in some manner, for where error as to one defendant in a conspiracy case requires that a new trial be granted as to him the rights of his co-defendants to a new trial depend whether that error prejudiced them. *Glasser v. United States*, 86 L. Ed. 680, 702, 315 U.S. 60. In discussing the same problem as to the appellants' standing to raise such an issue, the United States Supreme Court in *Hoffa v. United States*, 17 L. Ed. 2d 374, at page 381, stated: "It is clear on the other hand that Partin's reports to Agent Sheridan uncovered leads that made possible the development of evidence against petitioners Parks and Campbell." See, also, *Coplin v. United States*, 191 F. 2d 749, 756; *Nardoni v. United States*, 308 U.S. 338, 60 S.C. 266, 84 L. Ed. 307.

During the lengthy trial counsel for appellant Roberts had numerous conferences and conversations with appellant Levine and with his attorney as well as with all other defense counsel, relating to all phases of the trial, including trial strategy, the manner of cross-examination of witnesses, which defense attorney was to conduct the cross-examination of certain witnesses

and the advisability of and reasons for not calling any defendant as a witness. If any part of appellant Levine's conversations, monitored by the FBI, made reference to any of the foregoing matters, appellant Roberts' rights to effective assistance of counsel were equally as prejudiced and violated as those of appellant Levine. Further, if any part of these conversations uncovered leads that made possible the development of evidence against appellant Roberts, he is entitled to a new trial. *Hoffa v. United States, supra.*

If this Court deems that Roberts is not entitled to a new trial as a matter of law, appellant Roberts respectfully requests that this matter be remanded to the District Court for an evidentiary hearing as to the question of whether any of the conversations monitored might refer to appellant Robert's counsel or any statements attributed to such counsel, as well as to ascertain if any of the intercepted material was in any way indirectly communicated to any other person representing or in any way connected with the Securities and Exchange Commission or the prosecutor who tried this matter and to further ascertain if any part of those conversations uncovered leads that made possible the development of evidence against appellant Roberts.

Respectfully submitted,

Thomas F. Call
Attorney for Appellant Robert B. Roberts
523 West Sixth Street, Suite 737
Los Angeles, California 90014
Telephone: 627-8104

Dated: April 6, 1967

APPENDIX "C."

United States Court of Appeals, Fifth Circuit.

Norman Gradsky, George Levine, Howard W. Meadors, Gertrude Hogue, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. 19974.

Filed: May 3, 1967.

Appeal from the United States District Court for the Southern District of Florida.

Before Coleman, Dyer (Circuit Judges, Estes 1967), District Judge.

By the Court:

The motion of appellant, Robert B. Roberts, to remand this cause as to him to the United States District Court for a new trial is denied, without prejudice to such application by him to the District Court as may be appropriate.

APPENDIX "D."

Motion to Reconsider Motion of Appellant Robert B. Roberts to Remand to the United States District Court for a New Trial.

Appellant Robert B. Roberts.

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. No. 19974.

On April 11, 1967, Appellant Robert B. Roberts filed a Motion to Remand to the United States District Court for a New Trial, which was denied by this Court on May 3, 1967, without prejudice to such application by Roberts to the District Court as may be appropriate.

On March 20, 1967, the United States Supreme Court granted a Writ of Certiorari in *O'Brien, et al. v. United States*, 87 S. Ct. 1158, which would appear to be controlling in this case and require a remand to the District Court for a new trial. In the *O'Brien* case the Solicitor General conceded that a wiretap had been used to overhear certain conversations of Petitioner O'Brien, but stated that the logs of the monitoring agents were not communicated in any manner outside the FBI. Co-petitioner, Thomas Parisi, was not involved in any way in the wiretap, but nevertheless was granted a new trial in the District Court together with Petitioner

O'Brien. Appellant Roberts stands at precisely the same position in this case as Parisi in the *O'Brien* case and, accordingly, respectfully requests this Court to reconsider its denial of Robert's Motion to Remand in view of *O'Brien v. United States, supra.*

Respectfully submitted,

Thomas F. Call
Attorney for Appellant
Robert B. Roberts

Dated: May 9, 1967.

APPENDIX "E."

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glasser and E. E. Gibbons, Appellants, versus United States of America, Appellee. No. 19974.

Appeal from the United States District Court for the Southern District of Florida.

Before Coleman and Dyer, Circuit Judges, and Estes, District Judge.

By the Court:

It Is Ordered that the motion of appellant, Robert B. Roberts, for reconsideration of the denial of his motion to remand in this cause be and the same is hereby Denied.

(Original Filed—May 25, 1967)

APPENDIX "B."

In the United States Court of Appeals, for the Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, versus United States of America, Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(May 2, 1967.)

Before Coleman and Dyer, Circuit Judges, and Estes, District Judge.

Dyer, Circuit Judge: Appellants were tried and convicted by a jury in the District Court for violating the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C.A. §77q(a), the Mail Fraud Statute, 18 U.S.C.A. §1341, and for conspiring to violate those laws, 18 U.S.C.A. §371.

The indictment charged the appellants with a fraudulent scheme to offer and sell promissory notes of Credit Finance Corporation to the public by use of the mails, and then divert the investors' funds to the appellants' personal use. Numerous false and misleading statements by the appellants induced people to purchase the notes. Count one of the indictment alleges in detail the fraudulent scheme. Each of the succeeding eight substantive counts alleges a separate employment of the scheme on a different investor by use of the mails. Count ten alleges a conspiracy to do the acts charged in Counts one through nine.

The jury found each appellant guilty on all ten counts. This court in *Gradsky v. United States*, 5 Cir., 1965,

342 F.2d 147, reversed sub nom. *Levine v. United States*, 1966, 383 U.S. 265, 86 S.Ct. 295, 15 L.Ed.2d 737, affirmed the convictions of Norman Gradsky, B. J. Gradsky, Gertrude Hogue, Robert Grene, George Levine and Leonard L. Glaser. It affirmed the conviction of Robert B. Roberts as to Counts 3, 6, 8 and 10 and reversed as to the remaining Counts 1, 2, 4, 5, 7 and 9; it affirmed the conviction of Alfred Schiff as to Counts 2, 8, 9 and 10 and reversed as to the remaining Counts 1, 3, 4, 5, 6 and 7; and it affirmed the conviction of E. E. Gibbons as to Counts 6 and 10 and reversed as to the remaining Counts 1, 2, 3, 4, 5, 7, 8 and 9.

Appellants Levine, Roberts, Grene, Norman Gradsky and B. J. Gradsky petitioned the Supreme Court for and were granted writs of certiorari, and as to them this court's mandate was stayed. Appellants Gibbons, Hogue, Schiff and Glasser did not petition for certiorari, and this court's mandate issued as to them on April 22, 1965, so they are now serving their sentences. Before reaching the merits, therefore, we must decide whether the appellants as to whom the mandate has already issued may be heard in this remand proceeding.

Usually the issuance of a mandate by this court means that the litigation has come to an end. *Hines v. Royal Indemnity Co.*, 6 Cir., 1958, 253 F.2d 111. This court can, however, recall its mandate to prevent injustice.[1] Rules of the Fifth Circuit Court of Appeals,

[1] Gertrude Hogue has moved to intervene in participating in this proceeding.

We are recalling the mandate with respect to appellant Roberts since he has petitioned the Supreme Court for certiorari.

Rule 32; *Meredith v. Fair*, 5 Cir., 1962, 306 F.2d 374; 28 U.S.C.A. §452. In view of the unusual circumstances of this case, the government's expression of non-opposition, and our desire to avoid further protracted litigation by appellants not presently participating in this remand proceeding, we recall our mandate as to appellants Gibbons, Schiff and Glaser and allow them to join in this proceeding.

The Supreme Court granted the petitions for writs of certiorari "* * * limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it." The petitions were denied in all other respects. *Levine v. United States*, 383 U.S. at 266. In disposing of the case the Supreme Court said:

> "In response to specific questions addressed by this Court, the Solicitor General has made a two-pronged concession: First, he concedes that an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; and second, he concedes that in this case some of the convictions for the substantive offenses must be reversed because they are inconsistent with this principle.[1] On the basis of this concession, and upon consideration of the entire record, we vacate the judgment of the Court of Appeals insofar as it affirms petitioners' convictions for the substantive offenses. We remand the case to that court with instructions to reverse the convictions the Solicitor General concedes must be reversed, and to

determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor General petitioners are entitled to further relief regarding the convictions for the substantive offenses." Id. at 266-67. [Footnote omitted]

The Solicitor General conceded that appellant Levine's convictions on Counts 1, 3, 4, 5, 6, 7 and 8, and appellant Grene's convictions on Counts 1 and 7 must be reversed; therefore, this court on remand reversed the convictions on the stated counts and vacated the sentences; denied a motion by the Gradskys to remand to the District Court; and directed all of the appellants to file motions urging such further consideration as they might deem appropriate.

Notwithstanding the limited issue upon which the writs of certiorari were granted and thus our narrow scope of review on this remand, the appellants seek a re-review of alleged errors presented to and decided by us on the appeal[1] and attempt to assert now for the first time other errors, none of which are within the purview of the mandate of the Supreme Court. Except that which we are mandated to review, our previous

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[1] The following were submitted and considered on the appeal [illegible] in this proceeding: The appellants' contention that the district court erred in refusing to instruct on the essential elements of conspiracy and of the substantive offenses, the lack of evidence to sustain a conviction on direct [illegible], and the failure to instruct on aiding and abetting or [illegible] by an employee as a [illegible] necessary, failure to instruct on [illegible] and responsible doubt; failure to grant a continu- [illegible] that the verdict was against the weight [illegible]

rulings are the law of the case and will not now be reconsidered. *United Industrial Workers v. Galveston Wharves, et al.*, 5 Cir., 1966, 368 F.2d 412. We thus direct our attention to whether, in light of the Solicitor General's concession as to applicable legal principles, the members of the conspiracy "are entitled to further relief regarding the convictions for the substantive offenses."

In determining whether the evidence is sufficient to sustain a conviction on the substantive offenses we must view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government. *Glasser v. U.S.*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *Ring, et al. v. U.S.*, 5 Cir., 1967, . . . F.2d . . . (Number 23602, March 24, 1967). A party to a conspiracy is liable as a principal for all offenses committed in furtherance of the conspiracy while he is a member of it. *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489, but a latecomer cannot be convicted as a principal for substantive offenses which were committed in furtherance of the conspiracy before he joined it or after he withdrew from it. *Levine v. United States, supra.* In this case, with the exception of Schiff's conviction on Count 8, each appellant stands convicted of only those substantive offenses committed in furtherance of the conspiracy while he was a member of the conspiracy. There is thus no error.

In Count 8 the mailing is alleged to have taken place on or about January 21, 1960, some seven or eight months prior to the time appellant Schiff joined the conspiracy. The government concedes that Schiff's conviction on this count must be reversed.

Appellants also argue that as a result of the failure of the District Court's instructions to distinguish the substantive counts from the conspiracy counts some of the defendants were convicted of substantive offenses committed in furtherance of the conspiracy before they joined the conspiracy. We need not determine the validity of this contention for the Solicitor General has conceded that convictions of such offenses should be reversed.

Appellants also urged that the District Court should have charged that to find an appellant guilty of a substantive offense in which he did not directly participate, the jury must determine that the substantive offense was committed in furtherance of the conspiracy of which he was a member. We doubt that this contention is properly before us on remand but we note that no appellant either requested this instruction or objected to the failure of the court to give it, although the court heeded most of the objections made to its charges. Generally, the failure to object will prevent a party from presenting that error on appeal. *Evans v. United States*, 5 Cir., 1965, 349 F.2d 653; *Alvarez v. United States*, 5 Cir., 1960, 275 F.2d 299. In any event, the purpose of such an instruction is to preclude the possibility of convicting a defendant for a substantive offense committed by other members of the conspiracy of which the defendant is a member in furtherance of a conspiracy of which the defendant is not a member.

The instruction thus was unnecessary here for there was evidence of only one conspiracy.

Appellant Grene contends that the District Court abused its discretion in denying his motion for a continuance because, although his court appointed counsel

was competent, he had insufficient time to prepare for trial and thus Grene did not have effective assistance of counsel. Grene raised this point on the appeal, argued it in his main brief and in his petition for rehearing following the affirmance of his conviction. We decline to again consider this question, because it has been previously decided and is not within the scope of the remand to this court by the Supreme Court.

We conclude that in the light of the concession made by the Solicitor General, the evidence, the instructions to the jury, and the applicable principles of law, except as to the conviction of appellant Schiff for the offense charged in Count 8, the appellants were not improperly convicted of substantive offenses committed by members of the conspiracy before appellants had joined the conspiracy or after they had withdrawn from it.

After oral argument was heard by this court on remand from the Supreme Court, the appellee filed a motion to vacate the judgment as to appellant Levine and remand the cause as to him to the District Court for a new trial. It appears from the motion that the Federal Bureau of Investigation installed a microphone by trespass in a commercial establishment in which Levine may have had a proprietary interest and the Federal Bureau of Investigation overheard conversations of Levine with counsel relating to the charges. Levine was under indictment in this case and the trial on the indictment took place during the period of surveillance. The motion must, of course, be granted. *Black v. United States*, 385 U.S. 26, 1966 . . . . S. Ct. . . ., . . . L.Ed.2d. . . .

The judgment against Norman Gradsky is affirmed as to the sentences imposed on all counts.

The judgment against B. J. Gradsky is affirmed as to the sentences imposed on all counts.

The judgment against George Levine is vacated and the cause as to him is remanded to the District Court for a new trial.

The judgment against Robert B. Roberts is affirmed as to the sentence imposed on Counts 3, 6 and 8.

The judgment against Alfred Schiff is affirmed as to the sentences imposed on Counts 2 and 9 and the judgment and sentence on Count 8 are set aside and vacated.

The judgment against Robert Grene is affirmed as to the sentences imposed on Counts 2, 3, 4, 5, 6, 8 and 9.

The judgment against Leonard L. Glaser is affirmed as to the sentences imposed on all counts.

The judgment against E. E. Gibbons is affirmed as to the sentence imposed on Count 6.

The judgments and sentences on Count 10 against all of the appellants were affirmed on the appeal, certiorari was denied, and that count is not before this court on remand.

The case is remanded for further proceedings not inconsistent with this opinion and judgment.

Affirmed in part and Reversed in part.

APPENDIX "G."

United States Court of Appeals, Fifth Circuit.

Norman Gradsky, George Levine, B. J. Gradsky, Robert B. Roberts, Alfred Schiff, Robert Grene, Leonard L. Glaser and E. E. Gibbons, Appellants, vs. United States of America, Appellee. 19,974.

Filed: June 5, 1967.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

(June 5, 1967)

Before Coleman and Dyer, Circuit Judges, and Estes, District Judge.

PER CURIAM:

It Is Ordered that the petition for rehearing of appellant Robert B. Roberts in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX "H."

STATUTES INVOLVED

15 U.S.C. 77q(a). Fraudulent interstate transactions.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

18 U.S.C. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the

maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139 § 34, 63 Stat. 94.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 330

ROBERT B. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 318 Misc.

ROBERT GRENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals on remand (Roberts Pet. App. F) is not yet reported. The opinion of the court of appeals on the original appeal is reported at 342 F. 2d 147 (C.A. 5), and the order of remand by this Court is reported at 383 U.S. 265,

275-523—67——1

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1967. Petitions for rehearing were denied on June 5, 1967. Petitions for writs of certiorari were filed on July 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Both petitioners present the following question:

1. Whether, in light of the evidence and the instructions, they were properly convicted on substantive counts of the indictment.

Petitioners Roberts (No. 330) presents the following question:

2. Whether a defendant is automatically entitled to a new trial where it is shown that agents of the F.B.I. illegally monitored telephone conversations between a co-defendant and an attorney.

Petitioner Grene (No. 318 Misc.) presents the following question:

3. Whether the district court abused its discretion in denying a continuance.

STATEMENT

Petitioners Roberts and Grene, together with other defendants, were convicted in the United States District Court for the Southern District of Florida on [illegible] counts of an indictment charging securities and [illegible] fraud in violation of 15 U.S.C. 77q(a) and 18 [illegible], and a conspiracy to commit the substantive [illegible] in connection with the operations of the Crown Finance Corporation. Roberts was sentenced to

imprisonment for one year on each of the counts, the terms to run consecutively. Grene was sentenced to imprisonment for eighteen months on each of the counts, the terms to run consecutively.[1]

The court of appeals affirmed the conviction on all ten counts against Grene. The court reversed the conviction of Roberts on six counts, and affirmed as to four (Counts 3, 6, 8, and 10). *Gradsky* v. *United States*, 342 F. 2d 147 (C.A. 5).[2] On petitions for writs of certiorari, this Court granted the writs "* * * limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it." In all other respects the petitions were denied. *Levine* v. *United States*, 383 U.S. 265, 266. In accord with a concession of the Solicitor General, this Court held that a defendant could not be convicted of a substantive offense committed by a member of the conspiracy before he had joined the conspiracy, or after he had withdrawn from it, and remanded the case to the court of appeals "with instructions to reverse the convictions the Solicitor General concedes must be reversed," and to determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor Gen-

[1] Grene suggests (Grene Pet. 5) that he was not sentenced on Count 10. The judgment of conviction, however, clearly shows that he was sentenced to imprisonment for eighteen months on all counts, including Count 10 (R. 216).

[2] The Solicitor General conceded that as against Grene, the convictions on Counts 1 and 7 should be reversed.

eral petitioners are entitled to further relief regarding the convictions for the substantive offenses." *Levine* v. *United States*, *supra* at 267.

On remand, the court of appeals, in accord with the instructions, reversed the convictions against Grene on Counts 1 and 7, and affirmed on all the other counts. The conviction of Roberts on Counts 3, 6, 8 and 10 was again affirmed (Pet. App. F).

ARGUMENT

1. Both petitioners again challenge the sufficiency of the evidence supporting the convictions on the substantive counts.

(a) Roberts concedes that all of the substantive offenses of which he was convicted were committed by members of the conspiracy while he was a member of that conspiracy, but argues (Pet. 13–21) that the jury was not required to determine whether those offenses were committed in furtherance of the conspiracy. This argument was fully made in his prior petition for a writ of certiorari and reply brief (No. 125 O.T. 1965), and consideration thereof was declined by this Court. In any event, the claim is without merit. The trial court charged, *inter alia* (R. 4312–4313):

> Now as I have said in a conspiracy all conspirators are responsible for everything that the other conspirators said or did, and * * * someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not responsible * * * I mean he * * * may not know what they have done, but he is responsible for everything they do, both before and after-

> wards, so if your inquiry should determine whether there was two or more persons, and then if you find that two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible.
>
> It is kind of a partnership in crime.
>
> And as you know in partnerships each partner is responsible for what the other one does or what he says.

These instructions properly advised the jury that each member of the conspiracy could be convicted of substantive offenses committed by other members of the conspiracy while he was a member of such conspiracy. Although it is true, as petitioner suggests, that these instructions did not precisely state that such criminal responsibility was dependent upon a showing that the substantive offenses were in fact committed in furtherance of the conspiracy, such was the clear implication. Moreover, the court instructed the jury that they could convict only if they found that the use of the mails was in furtherance of the overall fraud (R. 4308). There was thus no error in reaffirming Roberts' conviction of Counts 3, 6, and 8 on remand.[8] *Pinkerton* v. *United States*, 328 U.S. 640.

(b) Grene apparently contends (Grene Pet. 12–15) that the evidence was insufficient to establish his membership in the conspiracy on January 21 and 25, 1960, when two of the substantive crimes (Counts 8 and 6 respectively) were committed in furtherance

[8] Roberts does not challenge the conviction on the conspiracy count—Count 10.

of that conspiracy. As we pointed out in our prior Supplemental Memorandum for the United States (Nos. 112, 125, 230 and 235, O.T. 1965, pp. 8–9), the evidence shows active participation in the conspiracy by Grene beginning some time "prior to" February 1960. A witness who sold realty to both C.F.C. (the corporate body involved in the fraudulent scheme) and Credit Realty, a related company, testified that he met with Grene "prior to" February 1960 regarding the sale in question (R. 3276). On February 20, 1960, that witness again met with Grene and two co-defendants (Gradsky and Glaser) in connection with the same sale (R. 3276–3278). The property involved was then divided into two equal sections, one going to C.F.C. and the other to Credit Realty (R. 3281–3282, 3286–3287). On March 20, 1960, Grene signed as a witness various instruments transferring property between C.F.C. and its related company, Credit Realty (R. 3315–3316, 3319–3321). In April 1960, when Gradsky resigned as president of C.F.C., Grene became president and chairman of the board (R. 946, 1394, 1692–1698, 1708, 2257, 3054–3060, 3458, 3633). Thereafter, Grene served as Gradsky's alter ego, and Gradsky retained control of C.F.C. through this subterfuge and Grene's cooperation in it (R. 1692–1698, 3458, 3633). From all of these attendant circumstances the inference could reasonably be drawn that Grene's participation in the conspiracy began at least as early as January 21, 1960.

2. After oral argument on remand, the United States filed with the court of appeals a memorandum in which it disclosed that the Federal Bureau of Inves-

tigation had, in the course of an investigation of an establishment owned by an acquaintance of [illegible] Levine, monitored a conversation between co-defendant George Levine and his counsel after the indictment had been returned (Pet. App. A). On the authority of *Black* v. *United States*, 385 U.S. 26, the court of appeals ordered a new trial for Levine. After the government's memorandum had been filed, petitioner Roberts filed a motion with the court of appeals in which, although recognizing "that this error as to appellant Levine does not necessarily require that his [Roberts'] conviction be set aside," he moved for a new trial, or in the alternative, for a remand of the cause to the district court for an evidentiary hearing to determine whether or not he was prejudiced by the monitoring of Levine's conversation (Pet. App. B). The court of appeals denied the motion for a new trial "without prejudice to such application by him to the District Court as may be appropriate" (Pet. App. C). It denied a similar motion to reconsider (Pet. App. D).

Relying upon *O'Brien* v. *United States*, 386 U.S. 345, Roberts contends that it was error for the court of appeals to deny his alternative motion for a new trial. In *O'Brien*, this Court ordered a new trial for petitioner O'Brien because of the overhearing of certain conversations between O'Brien and his attorney, and granted the same relief as to copetitioner Thomas Parisi, who had not been overheard. However, in that case, the Solicitor General did not oppose like disposition as to both O'Brien and Parisi although he took that position in the belief that both men were entitled to a

[illegible]

remand for a hearing and not a new trial (see Brief for the United States, *Charles Joseph O'Brien and Thomas Parisi* v. *United States*, No. 823, O.T. 1966, p. 12). As was stated in the memorandum of disclosure, and as the court of appeals ruled, Roberts is free to take such action as he deems appropriate in the district court, at which time the relevant portions of the F.B.I. logs pertaining to the monitored conversations will be disclosed to him under appropriate protective orders. Upon a proper application in the district court that court will be in a position to determine what relief, if any, is appropriate.

3. Grene also contends that the district court abused its discretion in denying a motion for a continuance because, although his court-appointed counsel was competent, he had insufficient time in which to prepare for trial. This argument was rejected on the original appeal (342 F. 2d 147), and further consideration was declined by this Court. The issue was not within the purview of the remand by this Court, and the court of appeals properly declined further consideration.

For the reasons stated above, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ROBERTS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 339. Decided October 16, 1967.

PER CURIAM.

The petition for certiorari is granted. Petitioner's conviction is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

In proceedings before the Court of Appeals pursuant to our previous remand, *Levine* v. *United States*, 383 U. S. 265, the Court of Appeals granted petitioner's co-defendant Levine a new trial based upon a disclosure by the Government that, after the return of the indictment, agents of the Federal Bureau of Investigation monitored conversations between Levine and Levine's attorney. But the Court of Appeals denied petitioner's motion for the same relief or, alternatively, for a remand to the District Court for an evidentiary hearing to determine whether he was prejudiced by the monitoring; the Court of Appeals stated, however, that the motion was denied "without prejudice to such application by him to the District Court as may be appropriate." In the circumstances of this case, and in light of the acknowledgment of the Solicitor General in his brief in opposition that "the F. B. I. logs pertaining to the monitored conversations" are available, we think the Court of Appeals erred in denying petitioner's alternative motion for an evidentiary hearing in the District Court. We therefore vacate petitioner's conviction and remand to the

District Court with direction to afford petitioner such an evidentiary hearing. Depending upon its findings, the District Court will either reinstate the conviction or order a new trial, as may be appropriate. See *Wade* v. *United States*, 388 U. S. 218, 242.

Vacated and remanded.

MR. JUSTICE BLACK dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.